Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

No. 77-244

LEE PHARMACEUTICALS,
*Petitioner,*

v.

DEN-MAT, INC., *et al.*,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on July 7, 1977 and July 13, 1977 in Cases No. 76-3428, 77-1214, 77-1215 and 77-1539 and on July 14, in No. 77-2547.

### THE RULINGS BELOW

No opinions were filed by the Court of Appeals in any of the cases involved in this petition. The relevant orders of the Court of Appeals in Cases 76-3628, 77-1214, 77-1215, 77-1539 and 77-2547 are reproduced as Appendix A, *infra*, pp. 1a to 7a.

There are no district court opinions which are relevant to the issue here raised.

## JURISDICTION

The orders of the Court of Appeals for the Ninth Circuit were filed on July 7, 1977, and July 13, 1977 in Cases 76-3628, 77-1214, 77-1215 and 77-1539 and on July 14, 1977 in Case No. 77-2547.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Do 28 U.S.C. §§ 46(b) and (c) require that a panel of three judges be assigned to decide every civil case and controversy raised before a Court of Appeals, including petitions for extraordinary writs, and prohibit a Court of Appeals from assigning panels of only two judges to make such determinations?

2. If the answer to question 1 is "yes" and timely objection is made by an adversely affected party, may the original void two-judge decision be validated by procuring the subsequent concurrence of a third originally non-participating judge, or must a new panel of three judges be assigned to consider the case *de novo*?

## STATUTES INVOLVED

This case directly involves 28 U.S.C. § 46 as follows:

"§ 46. Assignment of judges; divisions; hearings; quorum

"(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

"(b) In each circuit the court may authorize the hearing and determination of cases and controversies be separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and



hear the cases and controversies assigned as the court directs.

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court en banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court en banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

"(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

## STATEMENT OF THE CASE

This case brings before the Court the unusual question of whether a United States Court of Appeals may routinely assign two judge panels to dispose of cases and controversies, including petitions for extraordinary writs under 28 U.S.C. 1651, and whether a party that objects promptly upon notification of the relegation of its case to such a panel is entitled to the assignment of a three-judge panel for *de novo* review.

### A. The Events Below

On March 28, 1977, the Ninth Circuit filed an order (App. A, *infra*, p. 1a) of only two judges, Trask and Wallace, dismissing Appeals 77-1214 and 77-1215 "for lack of jurisdiction, the orders appealed from not being appealable". On the same date, the Clerk addressed a letter to counsel (App. A, *infra*, p. 2a) stating "an opinion was filed and a judgment entered in the above case

today, March 28, 1977, dismissing for lack of jurisdiction." (App. A, *infra*, p. 2a).

By the same two-judge order dated March 28, 1977, the Ninth Circuit "denied" the petitions for writ of mandamus in Nos. 76-3628 and 77-1539.

On April 4, 1977, petitioner Lee Pharmaceuticals, filed a motion addressed to the court *en banc* to vacate the aforementioned two-judge order. This motion specifically presented the question of "whether a panel or division composed solely of two judges of [the Court of Appeals] may determine any case or controversy".[1]

On April 28, 1977, the Court of Appeals filed an unsigned "Revised Order". (App. A, *infra*, p. 3a) This "Revised Order" states that the matters with which it deals were "Before" the same two judges, Trask and Wallace who filed the original two-judge order and also "Before" a third circuit judge, Choy. This "Revised Order" states that "on April 4, Lee Pharmaceuticals filed [a motion] for *en banc* consideration of the authority of the panel which issued this court's order of March 28, 1977. Solely to facilitate the proceedings of the district court the court issues the folowing order"—which order reiterates the April 28, 1977 rulings of the two-judge panel.

The "Revised Order" also states:

> "This order shall in no way be construed as a comment on the merits, or lack therof, of the arguments set forth in the emergency motion addressed to the court en banc." [2]

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[1] This motion also asked that the times for seeking reconsideration of the April 28, 1977 order be suspended pending disposition of the issue of the authority of the two-judge panel to act.

[2] The "Revised Order" also denied petitioner's motion to suspend times for filing requests for rehearing and set new times under Appellate Rules 40 and 41 to "commence from the date of entry of this order". Such rehearing requests were duly filed.



On May 9, 1977, petitioner filed a "Supplementary Statement . . ." in support of the original, April 4, 1977, motion addressed to the court *en banc* to set aside the March 28, 1977 judgments. This Supplementary Statement points out that the " 'Revised Order' is null and void for precisely the same reasons that the original order was null and void . . ."—*i.e.*, "because contrary to the provisions of 28 U.S.C. 46(b) and hence in violation of Lee's constitutional right to procedural due process." It further urges that

> "The 'Revised Order' . . . is purely cosmetic. It effects no substantive change in the *character* of the original two judge order. It does not and could not cure the fatal defect of that original order because it is *de facto* the same null and void decision by an improperly constituted two-judge panel, simply ratified after the fact by a third judge. As such, it is a mere indirect effectuation of action that this Court was statutorily precluded from taking directly—*i.e.* the determination of a case or controversy by an improperly constituted panel. The fact remains that no *panel* of three judges has ever been given an opportunity to decide any of the captioned matters *ad initio* as a *panel* in accordance with the minimal requirement of procedural due process under existing law.
>
> "Directly in point in the circumstances is the holding of the Supreme Court in *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965) as follows:
>
> > 'A fundamental requirement of due process is "the opportunity to be heard." Grannis v. Ordean, 234 US 385, 394, 58 L ed 1363, 1369, 34 S Ct 779. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have

wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. His motion should have been granted.'

"Here, the original improper assignment of a two-judge panel and the improper final disposition by that two-judge panel of all captioned proceedings can be cured only, as in *Armstrong*, 'by granting. . . . [the Lee] motion to set aside the decree and consider the case[s] anew.' . . ." (Emphasis in original).

On July 7, 1977 the Court of Appeals filed an unsigned order stating in its entirety:

"The emergency motion addressed to the court en banc having been circulated to the active bench and no judges electing to accept the suggestion for hearing en banc, the motion is hereby denied." (*infra*, p. 5a)[3]

On July 11, 1977 petitioner filed a further petition for writ of mandamus, assigned Case No. 77-2547 by the Court of Appeals. This petition is directed to a further compromise of Lee Pharmaceuticals' right to a jury trial in the specific context of trade secret issues through an order entered on June 28, 1977. On July 14, 1977 the Court of Appeals filed an order (App. A, *infra*, p. 7a)

[3] In the meantime, petiitoner filed petitions for rehearing. On July 11, 1977, the Court of Appeals filed an unsigned order in Appeals 77-1214 and 77-1215—with no indication of the identity or number of the judges who made the decision—stating in its entirety:

"Upon due consideration, the petition for rehearing en banc regarding the Court's dismissal of appeal nos. 77-1214 and 77-1215 for lack of jurisdiction is denied." (*infra*, p. 5a)

On July 13, 1977, the Court of Appeals filed an unsigned order (*infra*, p. 6a) dealing with matters "Before: Trask, Choy and Wallace, Circuit Judges" denying petitions for rehearing in the mandamus petitions, Nos. 76-3628 and 77-1539.



of a panel of only *two* judges stating that "Upon due consideration, the petition for writ of mandamus is denied."

### B. Pervasiveness of Ninth Circuit Resort to Two-Judge Panels

The Court of Appeals for the Ninth Circuit for several years has had a practice whereby it assigns judges in "panels" of only two rather than the three specified in 28 U.S.C. §§ 46(b) and (c), to dispose of *at least* substantive motions and petitions for extraordinary writs. It appears that currently all matters not specifically scheduled for oral argument may be referred for disposition to motion panels of only two judges. Appendix B, *infra*, p. 8a reproduces paragraphs 7-15 of the affidavit of petitioner's counsel dated April 4, 1977 recounting facts learned from the Ninth Circuit clerk's office concerning the nature and origin of the practice and its basis, if any, in published rules or statutes. In essence, these facts show that under the unpublished General Orders of the Court which "do not have standing as Rules of the Court and are not to be published or referred to in opinions or orders entered in any case" (General Order No. 27, *infra*, 16a),[4] procedures have been established for the regular use of only two judges from duly appointed panels of three to dispose of various motions in noncalendared cases before that Court. Even the letter of these "General Order" procedures, however, has apparently been somewhat eroded in favor of increased resort to summary dispositions by two judge panels, *inter alia*, in substantive matters that constitutionally qualify as "cases" and "controversies". Pointedly,

(a) General Order No. 3 (*infra*, 13a) contemplates that two-judge panels shall deal only with "motions in

[4] Note that these General Orders "are regarded as public records . . . available, during office hours for inspection on request of members of the bar of this Court, or unrepresented litigants in a case pending before the Court."

cases not calendared" and emphasizes that "Some such motions may be of a kind that action by three judges will be considered desirable."

(b) General Order No. 4 (*infra*, 15a) specifies that

> "Applications for writ of mandamus, prohibition and other extraordinary writs, whether addressed to an individual judge or to the Court, shall be deemed addressed to the Court unless, for emergency reasons, it is necessary for an individual judge to act thereon. Upon the filing of such an application, it shall, unless for emergency reasons an individual judge should act thereon, be immediately referred to a panel of three judges."

These general orders do not define the *actual* current Ninth Circuit practice, as this case illustrates. That practice has been elasticized to the fullest extent, in the interest of expedient but speedy disposition of pending matters, without regard to due process, justice and fair play.

This same attitude has infected the district court in this case, so that the trial judge, apparently confident that there will be no appellate correction, has eschewed the rules, the statutes and the relevant precedent to deal with petitioner's substantial case for patent and trademark infringement, and unfair competition, including trade secret misappropriation, in an unprecedentedly arbitrary fashion.

Subsequent summary final disposition of petitioner's appeals and mandamus petitions by a two-judge motion panel effectively leaves petitioner without any hope that justice is even available, much less likely to prevail.

In its March 28, 1977 one page order, a two-judge Ninth Circuit panel of Circuit Judges Trask and Wallace:

(1) *Sua sponte* dismissed "for lack of jurisdiction, the orders appealed from not being appealable", consolidated



Appeals 77-1214 and 77-1215 which sought relief pursuant to 28 U.S.C. 1292(a) from the *de facto* denial of a preliminary injunction consequent from the refusal of the district judge, for more than six months after it was first requested in April of 1976, to hold a hearing on petitioner's application of a preliminary injunction to terminate the use of its misappropriated trade secrets. This refusal was effected in the district court through improper Rule 42(b) severance orders by which the district judge *sua sponte* subordinated consideration of the issue of misappropriation of the plaintiff's trade secrets to an early and separate trial on the issue of validity of plaintiff's patents in suit, in derogation of the existing law of the case. The availability of appellate relief under 28 U.S.C. 1292(a) when the district court refuses to hold or to proceed with, a preliminary injunction hearing or to make a timely ruling after hearing is supported by case law in other circuits, including *United States* v. *Lynd*, 301 F.2d 818 (5 Cir. 1962) and *Dellinger* v. *Mitchell*, 442 F.2d 782, 788 (D.C. Cir. 1971) with which the order dismissing appeals in cases 77-1214 and 77-1215 is in conflict.

(2) Denied No. 76-3628, a petition for extraodinary writ, apparently by answering negatively the question of "whether the subject matter is appropriate for writ procedure" (General Order No. 4, *infra*, 15a). This petition was grounded upon an illicit *sua sponte* curtailment of petitioner's right to a jury trial on the patent validity issues. This ruling is in the teeth of *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959) and *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962). Notably, these cases counsel that correction by mandamus of any unauthorized curtailment of jury trial rights is a "responsibility of the Federal Courts of Appeal" (*id.* at 472).

(3) In No. 77-1539, apparently also held mandamus to be an inappropriate remedy. This petition raised serious

questions resulting from the district court's abrogation of the Federal Rules of Civil Procedure in favor of resort to what the district judge himself characterized as "unusual and innovative procedures" of his own expedient devising, including but not limited to suspension of all discovery rules, the threat of illicit reference of trade secret issues to a master,[5] the striking of affirmative defenses involving controverted facts in violation of Rule 12(f), severe curtailment of the right to request rehearing, and various other aberrancies.

That this summary two-judge disposition of serious issues is *usual* Ninth Circuit behavior is evident from the July 14, 1977 order of a *different* two-judge panel in No. 77-2547 which denies mandamus to correct a specific "unusual and innovative" order by the district judge in this case that (a) presumes to change the orders appealed from in Nos. 77-1214 and 77-1215, on which the appellate mandate has not issued, (b) establishes a procedure whereby the district judge without a jury will finally determine, *on a written record only*, whether petitioner's trade secrets are "valid" *before* it will entertain the now 15-month-old preliminary injunction motion and will so proceed even though (i) petitioner has never been permitted discovery concerning any aspect of the attacks to be made on such "validity" and hence is disabled to meet them, and (ii) a jury trial was timely demanded on the merits.[6]

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[5] Later implemented and then withdrawn solely because the chosen master was disqualified by virtue of his daughter's employment in the office of defendant's counsel.

[6] Another example of the Ninth Circuit use of a two-judge panel to dispose finally of a mandamus petition is apparent from the petition before this Court in No. 77-4 (see the petition at p. 9a) where the two-judge panel apparently held inappropriate to writ procedure the question of whether a judge should disqualify himself under 28 U.S.C. 455(a), and thus placed itself in direct conflict with decisions in other circuits including those in *SCA Services, Inc.* v. *Morgan*, No. 77-1194, (7 Cir. June 17, 1977) and *United States* v. *Ritter*, 540 F.2d 459 (10 Cir. 1976) and reversed, *sub silentio*, its own former stance on this issue as set forth in *Connelly* v. *United States District Court*, 191 F.2d 692 (9 Cir. 1951).



## REASONS WHY THE WRIT SHOULD BE GRANTED

1. The case presents issues of first impression as to the limits which 28 U.S.C. §§ 46(b) and (c) impose on the power and jurisdiction of the federal courts of appeal to assign panels of less than three judges to determine cases and controversies arising under the Constitution and laws of the United States. The decisions of the appellate courts in most federal question cases are ultimately determinative of all issues presented, since this Court's power of review is but sparingly exercised.

The paramount need for decisions of such courts to be rendered by properly constituted panels is starkly evident and need not be belabored. The Ninth Circuit has refused even to give considered attention to whether its current use of two-judge panels to dispose of cases violates 28 U.S.C. §§ 46(b) and (c).

The importance of this question is perhaps best epitomized by reference to the careful attention this court has afforded to questions touching the valid composition of, and the powers of, *en banc* appeals courts.[7] The relative rarity of *en banc* sittings is to be contrasted with the situation here posed which goes to the heart of all federal appellate cases.

2. The questions here uniquely invoke the supervisory power of this Court. So far as the record shows or petitioner's counsel are aware, no federal court of appeals, except the Ninth Circuit, presumes to attempt to dis-

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[7] *See Textile Mills Securities Corp.* v. *Commissioner of Internal Revenue*, 314 U.S. 326 (1941); *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U.S. 247 (1953); *United States* v. *American Foreign Steamship Corp.*, 363 U.S. 685 (1960).

charge the duty to decide cases imposed by 28 U.S.C. § 46 in assigned panels of two judges.[a]

It is focal to the public interest and to the proper operation of the federal judicial system that the power of any court of appeals to so proceed be resolved promptly.

3. A certainty that all federal courts of appeal will function in a non-aberrant, procedurally predictable fashion is primary to the maintenance of a stable system of law, and essential to foster public confidence in the judiciary. The need for enhancing such public confidence has recently been a subject of intense congressional concern resulting *inter alia*, in enactment of the current version of 28 U.S.C. § 455.

The present Ninth Circuit attitude is one of complete expediency. The court is seemingly able to rationalize almost any departure from established practice that enables it to speed up its disposition of cases even when the practice is *a fortiori* prejudicial to the possibility of reaching a just result. This Ninth Circuit attitude is in marked contrast, *e.g.* to that of the Eighth Circuit, wherein "The cause of judicial economy does not override . . . fundamental principle" in respect of "the right of any litigant to obtain a fair trial in fact as well as in appearance" *United States* v. *Pfizer, Inc.*, No. 77-1088 (8 Cir. July 18, 1977).

The Eighth Circuit's view comports with the public policy of Rule 1 of the Federal Rules of Civil Procedure, approved by this Court, which puts "just" trials *at least* on a par with "speedy" disposition of cases.

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[a] Personal experience of petitioner's counsel within the last eighteen months in each of the Second, Third, Fourth, Fifth, Seventh and D.C. Circuits is that none of these courts attempts to utilize two-judge panels to decide cases, whether or not arising under 28 U.S.C. 1651.



The contrasting Ninth Circuit attitude is virtually impossible to explain to non-lawyers without thoroughly discrediting the judicial system and the rule of law. It should not be encouraged to persist.

4. The refusal of the Ninth Circuit to give considered attention to the legality of assigning two judge panels to dispose of cases likewise detracts from public confidence in its other actions and pronouncements. A court which is unanimously disposed not even to examine the propriety of its own conduct vis-a-vis the statutory limits on its own jurisdiction presents a picture of autocracy, smugness and insularity rather than openmindedness, fairness and justice. It encourages similar conduct from the lower courts within the circuit to the further detriment of the judicial system and the public—as starkly evidenced by the conduct of the district judge in this case.

5. The Ninth Circuit practice is wrong and should be corrected.

As the Ninth Circuit has itself recognized in *Young Properties Corp.* v. *United Equity Corp.*, 534 F.2d 847, 849 (9 Cir. 1976), "The Court of Appeals is a court of limited jurisdiction and its jurisdiction is expressly provided for by statute."

As stated in CJS Judges § 58, "The powers and duties of Associate Judges are ordinarily defined by the Constitution or statute; where responsibility is placed on two or more Associate Judges, it may not be assumed by only one, and, where it is placed on a single Judge, he may not share the responsibility for his decision with other Judges."

28 U.S.C. § 46(b), the controlling statute, mandates:

> "In each circuit the Court may authorize hearing and determination of cases and controversies by separate divisions, each consisting of three Judges. Such divisions shall sit at the times and places and hear

the cases and controversies assigned as the Court directs."

Under Federal Rule of Appellate Procedure 27(c) "a single Judge may not dismiss or otherwise determine an appeal or other proceeding. . . ."

The actual General Orders of the Court below are consonant. In particular, General Order No. 4 requires that applications for extraordinary writs shall be "immediately referred to a panel of *three Judges* . . ." and prohibits a single Judge even in emergency from denying such a writ.[9] Indeed, no published or publicly available Ninth Circuit general order or rule makes any reference to a *panel* of *only* "two Judges".

This Court in dictum in *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247, 254 (1953) noted that 28 U.S.C. § 46(c) re *en banc* hearings "was motivated by a dual purpose" which included "securing the tradition of three-judge courts against any further intrusion". See also the Ninth Circuit's own dictum in *Bridges* v. *United States*, 201 F.2d 254, 255 (9 Cir. 1952) that "A United States Court of Appeals consists of three circuit judges, and, in circuits having more than three judges, it consists of a 'Division' of three judges" and the Fifth Circuit dictum in *Allen* v. *Johnson*, 391 F.2d 527, 531 (5 Cir. 1968) that the work of the Federal Courts of Appeal "is ordinarily to be—and today it must be—done by three-Judge panels."

*No* authority recognizes any prerogative to assign two-judge panels to determine cases and controversies. Indeed, the Ninth Circuit's disinclination to consider, discuss or otherwise give prominence to the problem must be

[9] "[A]n individual judge . . . shall not deny the application, but may order that an answer be filed, all further proceedings to be had before a panel [of three judges]."



deemed a tacit admission that it cannot itself justify its conduct as a matter of law.

## CONCLUSION

The writ should be granted.

Respectfully submitted,

EDWARD S. IRONS
*Attorney for Petitioner*

# APPENDICES

**APPENDIX A**

**ORDER**

**filed March 28, 1977**

**in**

**No. 76-3628**
**No. 77-1214**
**No. 77-1215**
**No. 77-1539**

Before: TRASK and WALLACE, Circuit Judges

Upon due consideration, the Court issues the following order:

(a) the petition for writ of mandamus, No. 76-3628 is denied;

(b) the petition for writ of mandamus, No. 77-1539 is denied;

(c) the motion for extension of time is treated as a motion to file late response and is granted;

(d) the motion for stay is denied; and

(e) appeals Nos. 77-1214 and 77-1215 are dismissed for lack of jurisdiction, the orders appealed from not being appealable.

/s/ Ozell W. Trask

/s/ [Illegible] Wallace
United States Circuit Judges

MoCal 3/21/77

**Letterhead of Office of the Clerk for
U.S. Court of Appeals for
the Ninth Circuit**

March 28, 1977

TO ALL COUNSEL:

Re: Nos. 77-1214 & 77-1215—Lee Pharmaceuticals v. United States District Court for the Central Dist. v. Den-Mat, Inc., et al.

Dear Counsel:

An opinion was filed and a judgment entered in the above case today, March 28, 1977 dismissing for lack of jurisdiction.

You have (14) days, from the above date, in which to file a petition for rehearing.

The mandate of this court shall issue (21) days after entry of judgment unless the court enters an order otherwise. If a petition for rehearing is filed and denied, the mandate will issue (7) days after the entry of the order denying the petition.

Sincerely,

/s/ Emil E. Melfi, Jr.
EMIL E. MELFI, JR.
Clerk of Court

See Rules: 36, 40(a) and 41(a) of the Federal Rules of Appellate Procedure

CO 76.2



**REVISED ORDER**

**filed April 28, 1977**

**in**

**Nos. 76-3628
77-1214
77-1215
77-1539**

Before: TRASK, CHOY and WALLACE, Circuit Judges

On April 4, 1977, Lee Pharmaceuticals filed two emergency motions requesting a suspension of the periods for seeking rehearing and issuance of the mandate and for en banc consideration of the authority of the panel which issued this Court's order of March 28, 1977. Solely to facilitate the proceedings in the district court the court issues the following order:

(a) The petition for writ of mandamus, No. 76-3628 is denied;

(b) The petition for writ of mandamus, No. 77-1539 is denied;

(c) The motion for extension of time is treated as a motion to file late response and is granted;

(d) The motion for stay is denied;

(e) Appeals Nos. 77-1214 and 77-1215 are dismissed for lack of jurisdiction, the orders appealed from not being appealable;

(f) The emergency motion addressed to the court en banc shall be treated as a suggestion for hearing en banc and shall be circulated to the active bench for a vote; and

(g) The emergency motion to suspend the periods of time for rehearing and issuance of the mandate

is denied and new periods of time pursuant to Rules 40 and 41 Federal Rules of Appellate Procedure shall commence from the date of the entry of this order.

This order shall in no way be construed as a comment on the merit , or lack thereof, of the arguments set forth in the emergency motion addressed to the court en banc.



**ORDER**

**filed July 7, 1977**

**in**

**No. 76-3628**
**77-1214**
**77-1215**
**77-1539**

The emergency motion addressed to the court en banc having been circulated to the active bench and no judges electing to accept the suggestion for hearing en banc, the motion is hereby denied.

**ORDER**

**filed July 11, 1977**

**in**

**No. 77-1214**
**77-1215**

Upon due consideration, the petition for rehearing en banc regarding the Court's dismissal of appeal nos. 77-1214 and 77-1215 for lack of jurisdiction is denied.

**ORDER**

**filed July 13, 1977**

**in**

**No. 76-3628**
**77-1214**
**77-1215**
**77-1539**

Before: TRASK, CHOY, and WALLACE Circuit Judges

Upon due consideration, the Court issues the following order:

(a) the motion for extension of time to file petitions for rehearing is granted and the petitions heretofore received are ordered filed;

(b) the motions to defer consideration of the petitions for rehearing are denied;

(c) the "supplementation and petition for rehearing" filed in no. 76-3628 is denied; and

(d) the "supplementation and petition for rehearing" filed in no. 77-1539 is denied.



**ORDER**

**filed July 14, 1977**

**No. 77-2547**

Before: TRASK and ANDERSON, Circuit Judges

Upon due consideration, the petition for writ of mandamus is denied.

/s/ Ozel W. Trask

/s/ [Illegible] Anderson
United States Circuit Judges

## APPENDIX B

### PARAGRAPHS 7 to 15 OF AFFIDAVIT OF MARY HELEN SEARS IN SUPPORT OF EMERGENCY MOTIONS OF LEE PHARMACEUTICALS TO VACATE APRIL 28, 1977 ORDERS AND SUSPEND RECONSIDERATION TIMES

### AVERMENTS WITH RESPECT TO FACTS RELEVANT TO THE MOTION TO SET ASIDE PORTIONS OF THE EXHIBIT A ORDER

7. Upon learning in the manner described in paragraph 2 hereof about this Court's order signed by two judges thereof and filed on March 28, 1977, I thereupon personally telephoned the Clerk's office of this Court and spoke with an unidentified member of the staff thereof from whom I inquired in substance:

(a) Whether this Court had in fact filed an opinion as Exhibit B suggests, in Appeals 77-1214 and 77-1215.

(b) Whether the Exhibit A order was solely the product of *two*, rather than three, judges. I was told, in substance, that under the rules of this Court, two judges can dismiss an appeal or deny a petition for an extraordinary writ such as mandamus. I then asked for identification of the rule and was told that the person to whom I was speaking could not help me and given a suggestion to call Mr. Melfi, the Clerk of the Court, on the next succeeding day.

8. The only copy of the rules of this Court available in my office in Washington, DC is contained in the bound volume and current pocket part of West Publishing Company's United States Code Annotated, Title 28, appellate rules volume, and I had several weeks earlier ascertained



that it is not up to date and that the deficiency is not wholly compensated either by the notices in the advance sheets of Federal Reporter Second or otherwise and had then attempted, without success, because such rules were said to be temporarily out of print, to procure a current copy of this Court's rules from the Clerk of the Court. Since on checking these available rule sources, I found no counterpart of the alleged rule of this court described by the unidentified person in the Clerk's office, I thereupon telephoned to Hubert W. Dubb, a lawyer of my acquaintance resident in San Francisco, California, and asked him if he could ascertain for me the number and precise wording of any rule of this Court that permitted a division of two judges only to dismiss an appeal or decide a mandamus petition.

9. Later on March 30, 1977, Mr. Dubb telephoned to me, and stated in substance that (a) he could find no such provision in the printed rules of the Court and (b) he had accordingly contacted Miss Taylor of the Clerk's Office of this Court and asked for help. He reported further that Miss Taylor had stated in substance her understanding that there was no written local rule governing the situation, but that it was a practice of this Court for only two judges, constituting those assigned each week to the motion calendar, to be assigned to consider any matter not calendared for oral argument and if they agreed on the disposition to be made, to fully decide the matter whatever it might be, *but* if they did not, for a third judge to be called in to break the tie. Mr. Dubb indicated that Miss Taylor had further told him in substance that this was considered appropriate as she understood it, because under federal law two judges are a quorum, but that she was not a lawyer and, hence, could not explain further.

10. On March 31, 1977, I received copies of Exhibits A and B by mail from this Court.

After I was certain, having due regard to the time difference between Washington, D.C. and San Francisco, that the Office of the Clerk of this Court would be open for business, I attempted to telephone Mr. Melfi in accordance with the suggestion of the unidentified person to whom I had spoken on the previous afternoon, and I learned that he was on vacation.

11. I thereupon endeavored to, and did, contact his secretary to whom I explained the nature of my inquiry and asked whether there was an assistant clerk who might be able to help me. She referred me to the Chief Deputy Clerk of the Court, who turned out to be Miss Taylor and who in substance told me just what she had told Mr. Dubb. I then inquired how long the two-judge panel practice had subsisted and whether anyone had ever objected to it, and she stated that the practice was "several" years old, and had not so far as she knew been objected to or protested. I further inquired in substance whether she knew of any written directive or justification upon which the Court relied to so proceed and she told me that she was not a lawyer, but that Mr. Schickele, an attorney on the staff of the Court, might be able to give me further information or assistance in that regard.

12. I thereupon spoke with Mr. Schickele, to whom I put my question as to whether there was any written directive authorizing reference to two judges only of this Court of a mandamus petition or an appeal. Mr. Schickele, in substance responded that while he was aware of the practice of referring motions to two judges only for decision, he did not know how long it had been in effect, or how it arose and did not know of any pertinent written directive. Upon further inquiry from me, he told me in substance that he knew of no written rationale or justification for the practice and though he believed he once heard of a challenge in the Supreme Court, he was wholly uncertain as to precisely what may have been challenged



or of what happened, if there was a challenge, and had never seen any relevant decision or other written disposition. He further suggested I talk to a gentleman whose name I understood to be Mr. Locke, the administrative officer of the Court, because of the latter's longer tenure with the Court and possible greater knowledge concerning the practice.

13. I thereupon telephoned this gentleman, to whom I made the same inquiries in substance as I had earlier made to various personnel of this Court as described hereinabove. He told me in substance that the basis for the practice is General Order 3 of the Resolutions of the Judicial Council of the Ninth Circuit, that he knows of no challenge to the practice heretofore and that it has subsisted for several years. He also called my attention to General Order No. 27 of the same Resolutions. I then asked whether copies of these general orders were obtainable and he stated to me that any member of the bar of the Court could obtain access to all Resolutions of its Judicial Council in the Clerk's office.

14. I thereupon telephoned Mr. Dubb and requested that some appropriate person from his law office go to the Office of the Clerk of this Court and obtain for me the text of General Orders No. 3 and 27 and any other parts of the Resolutions of the Judicial Conference that might appear pertinent.

15. Later that day, Mr. Hugh Finley of Mr. Dubb's law office telephoned me and reported that he had personally inspected all of the General Orders constituting the Resolutions of the Judicial Council of the Ninth Circuit Court of Appeals and that he had selected Nos. 3, 4 and 27 as being relevant to the various questions I had raised and had obtained copies of them.

At my request, he arranged for these copies to be transmitted to my office by telecopier. Exhibit C here-

to comprises a true copy of all information I thereby received.

16. To the extent that Exhibit A reflects disposition of No. 76-3627 by two judges only, these being judges assigned to the motion calendar for the week of March 21, 1977, it is inconsistent with advice earlier given me by an unidentified person on the staff of the Clerk's office. Specifically, on or about February 14 or 15, 1977, I inquired by telephone as to whether No. 76-3628, filed over sixty days earlier on or about December 13, 1976, had been forwarded to a panel for consideration and I was assured that it had been.

/s/ Mary Helen Sears

MARY HELEN SEARS

CITY OF WASHINGTON )
) ss:
DISTRICT OF COLUMBIA )

Subscribed and sworn to before me personally this 4th day of April, 1977.

(Original Notarized)

Notary Public



## GENERAL ORDERS OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT

### General Order No. 3

### Motions Calendars

1. *Motions in calendared cases.* Motions in cases already calendared for oral argument, under submission to a panel of the court or assigned to a screening panel of the court shall be submitted to that panel.

2. *Motions in cases not calendared.* Judges assigned to panels set up to dispose of weekly motion calendars shall be selected pursuant to a rotation system whereby each judge shall serve an equal number of times as the number one, number two and number three judges named on such panels. Motion panels shall be constituted of circuit judges in active service and senior circuit judges who are willing to act on motions. The selection shall be made sufficiently far in advance so that all judges will know, at least four weeks in advance, what weeks they will have been assigned to serve on such a motion panel. If a judge finds it impracticable or inconvenient to serve on a motion panel to which he has been assigned, it will be his responsibility to arrange for another judge to take his place.

The number one judge on a motion panel shall have the initial responsibility of preparing all proposed orders or memoranda necessary to process and finally dispose of the motion, except that where the motion is to be transferred to another panel, his responsibility shall end when such transfer is accomplished.

When an emergency motion, filed in compliance with Rule 6(g) of the Rules of the Ninth Circuit, is received by the Clerk, he shall immediately distribute it to the panel handling motions for that week, as provided in this

General Order, *provided* that two members of that panel are immediately available in San Francisco or Los Angeles to act upon the motion. There may be emergency motions with regard to which only judges immediately available in San Francisco could act with the required expedition, if practicable, a member of the current motion panel shall make this determination. In making such distribution, the Clerk shall call attention to the emergency character of the motion.

If two members of the current motion panel are not immediately available, but one is, the Clerk shall contact him, call attention to the problem and ask such judge to decide whether to: (1) grant a brief *ex parte* stay to enable the current motion panel to dispose of the emergency motion in the event such judge believes a stay is warranted, or (2) have the Clerk call upon an immediately available judge not on the current motion panel to assist in the disposition of the motion. Some such motions may be of a kind that action by three judges will be considered desirable. In the event no member of the current motion panel is immediately available, the Clerk shall immediately contact the Chief Judge and ask for a decision of the kind described above.

If it is necessary for the Clerk to call upon one or more judges not on the current motion panel, he shall do so by lot, accomplished by drawing the required number from the names of readily available judges.

The general motion calendars and associated materials shall be distributed not later than the Friday preceding the current motion-panel week. The Clerk may not supplement this calendar with additional non-emergency motions which become ripe for disposition during the course of that week. Except for emergency motions, the Clerk will distribute only those motions which have been served, and to which a response has been received, or the time for filing a response has elapsed.



## General Order No. 4

### Processing of Applications for Writs of Mandamus, Prohibition and Other Extraordinary Writs Other than Habeas Corpus

Applications for writs of mandamus, prohibition and other extraordinary writs, whether addressed to an individual judge or to the Court, shall be deemed addressed to the Court unless, for emergency reasons, it is necessary for an individual judge to act thereon. Upon the filing of such an application, it shall, unless for emergency reasons an individual judge should act thereon, be immediately referred to a panel of three judges.

Pursuant to Rule 21(b), Federal Rules of Appellate Procedure, the panel shall first determine, ex parte, whether the subject matter is appropriate for writ procedure. If the panel determines that the subject matter is not appropriate for writ procedure, it shall deny the application forthwith, subject however to a petition for reconsideration. Such summary denial shall not be regarded as a decision on the merits. If the panel shall determine that the subject matter is appropriate for writ procedure, it shall order that an answer to the application be filed by the respondents within the time fixed by the order, and further proceedings thereon shall be had as provided in Rule 21(b) of the Federal Rules of Appellate Procedure.

If, by reason of emergency, it is necessary that such an application be first brought to the attention of an individual judge, he shall not deny the application, but may order that an answer be filed, all further proceedings to be had before a panel.

A panel or an individual judge may, in the event an order is entered calling for an answer, enter a stay order to the extent authorized by applicable rules and statutes.

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Note: At the Warner Springs meeting, on February 23 and 24, 1968, it was the general view that a General Order should be promulgated governing internal procedure in such matters. Such procedure will replace our present "Leave to File" procedure but has about the same effect.

## General Order No. 27

### Use of General Orders

The General Orders of this Court pertain exclusively to the internal functioning of this Court and therefore do not have standing as Rules of the Court and are not to be published or referred to in opinions or orders entered in any case. Nevertheless, the General Orders shall be regarded as public records and the file of General Orders maintained by the Clerk shall be available, during office hours, for inspection on request of members of the bar of this Court, or unrepresented litigants in a case pending before the Court. Copies of applicable General Orders may also, on the request of a member of this Court, be supplied to visiting judges for their use in assisting with the work of this Court.

In addition to maintaining the original file of General Orders, the Clerk shall provide each judge of this Court, active or retired, with a loose-leaf book containing a complete set of the General Orders. Each order shall show the date on which it was entered and the effective date of the order.